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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 10103

COPPERWELD STEEL COMPANY,
Plaintiff

BALTIMORE & OHIO RAILROAD COMPANY,
Intervener

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Copperweld Steel Company, Plaintiff, and Baltimore and Ohio Railroad Company, Intervening Plaintiff, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and order of the United States District Court entered herein on June 24, 1952. A petition for appeal is presented to the District Court herewith, to-wit,

Opinion Below

The opinion of the District Court for the Western District of Pennsylvania was rendered on June 24, 1952. A copy of the opinion and judgment entered the same day are attached hereto as Appendix "A".

Jurisdiction

The judgment of the District Court was entered on June 24, 1952. A petition for appeal is presented to the District Court herewith, to-wit, on August 12, 1952. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253 and 2101(b). *United States* v. *Capital Transit Co.*, 338 U. S. 286. *Henderson* v. *United States*, 339 U. S. 816.

Statutes Involved

This appeal involves the interpretation of the following statutory provisions: Section 15 (13) of Part I of the Interstate Commerce Act 54 Stat. 911 (49 U.S.C. Par. 15 (13)), which reads as follows:

> If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

Section 15 (1) of Part I of the Interstate Commerce Act 54 Stat. 911 (49 U.S.C. Par. 15 (1)), which reads as follows:

> Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension or any pending complaint or with-

out any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

Section 6 (7) of Part I of the Interstate Commerce Act, 41 Stat. 483 (49 U.S.C. Par. 6 (7), which reads as follows:

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and

published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Sections 1 (3), 1 (4), 1 (10) and 1 (11) of Part I of the Interstate Commerce Act, 41 Stat. 474 (49 U.S.C. Pars. 1 (3), 1 (4), 1 (10), and 1 (11), which read, in part, as follows:

1 (3) (a) " . . . The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported . . . "

1 (4) "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request . . . "

1 (10) "The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, inter-change, and return of locomotive, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

1 (11) "It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service . . . "

The National Transportation Policy, 54 Stat. 899, preceding Section 1 of the Interstate Commerce Act (49 U.S.C. par. 1), which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —— all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Statement

This action was brought by Plaintiff industry to set aside, annul, suspend and enjoin an order of Division 3 of the Interstate Commerce Commission, entered September 28, 1951, in proceedings known as Investigation and Suspension Docket No. 5357, Terminal Allowance, Copperweld Steel Company, Warren, Ohio. The Baltimore and Ohio Railroad Company, the carrier involved, by appro-

priate order of the District Court was authorized to intervene as Plaintiff in this action. It has not prosecuted a separate appeal in this cause but has joined with the Plaintiff industry, as authorized by Rule 48 of the Rules of the Supreme Court of the United States, as amended. Petitions of Plaintiff and Intervening Plaintiff for reconsideration by the entire Commission of said order of Division 3 was denied by the Commission on November 20, 1951.

The Commission in its report of September 28, 1951, entered by Division 3, held that the existing line-haul rates of the intervener railroad must be construed to cover the delivery and receipt of shipment at reasonably convenient points; that the interchange tracks in Yard 100 in Plaintiff's plant constitute such reasonably convenient points; that the common carrier transportation which the railroad is obligated to perform begins and ends at those interchange tracks; that all services beyond those tracks are in excess of those required in simple switching or team track delivery and are industrial or plant services which it is not the duty of the railroad to perform; and that the performance by the railroad without reasonable compensatory charges in addition to the line-haul rates of the described services within the plant area beyond the interchange tracks results in Plaintiff receiving a preferential service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected, in violation of Section 6 (7) of the Interstate Commerce Act.

By its order entered on said report, Division 3 required the cancellation of the tariff providing for terminal allowance to the industry of $1.19 per car, which said allowance in previous report and order had been found by Division 3 just and reasonable in those instances where in that order it found such service was within the railroad's com-

mon carrier obligation to perform under the line-haul rates.

The effect of the above report and order is to deprive the industry of any and all placement of loaded or empty cars, and of any and all switching services with respect to inbound and outbound shipments.

This action of the Commission is complained of because the Commission has misapplied long established principles promulgated by it in its own Ex Parte 104, Part II proceeding, cited as In Re: Propriety of Operating Practices—Terminal Service, 209 I.C. 11, and has based its order on findings arrived at in an arbitrary manner without evidentiary support contained in either specific findings in the report itself or in the evidence of the case. Although the application of such principles may have justified the Commission in making similar orders in other cases previously decided by it, it did so in the instant case and applied them to an industry with none of the reasons existing in other cases present in this case.

The industry's yards and tracks were designed and constructed within the last ten years, under the supervision of impartial railroad engineers and traffic experts to meet the recognized and established rules of the Interstate Commerce Commission relating to plant switching and terminal services. Only one railroad serves the plant and the evidence establishes clearly that motive power of the industry and the motive power of the railroad operate without interference or delay to the switching performed by the railroad. In spite of such evidence and in face of complete lack of evidence to the contrary, the Commission made an inferential finding of inherent interference.

The Three-Judge Statutory Court erred in ignoring the evidence of the case and failed to give due weight to the examiners report and findings, which in all material respects, differ from those of the Commission and in abdicat-

ing its functions of reviewing the facts through the expedient of refusing to substitute its judgment for that of the Commission, thus, perpetuating a discrimination against this industry, obviously resulting from the Commission's Order.

The Questions Involved are Substantial

This case involves a question of great importance to the nation's industries, to its railroads and to the public generally because the Interstate Commerce Commission has exceeded its authority and abused its discretion by entering its report and orders based thereon arbitrarily and without evidence to support such orders. In doing so the Commission has gone far beyond the rules and principles laid down by this Court in: *United States* v. *American Sheet & Tin Plate Co., et al,* 301 U.S. 402; *United States* v. *Wabash R. Co., et al,* 321 U.S. 403; *United States* v. *Denver and Rio Grande R. Co., et al,* 339 U.S. 186; and *Universal Camera Corp* v. *National Labor Relations Board,* 340 U.S. 474. In so doing, the Commission has violated the letter and intent of the Interstate Commerce Act, the National Transportation Policy and the Administrative Procedure Act. In its zeal to apply worthy principles of protecting the railroad's funds, revenues, and preventing discriminations, the Commission has resorted in this case to arbitrary actions and practices. Unless reviewed and checked by this Court, the result in this case is to deprive Plaintiff and other industries similarly situated of their property without due process of law.

Indeed, the ruling of this case, if sustained, gives the Commission a "green light" to short-cut its procedures in this class of cases and on the basis of recited general findings and ultimate conclusions *only,* devoid of evidentiary support, deprive a large portion of the nation's in-

dustries of rights and privileges consistently recognized and protected by the Commission and the Courts from the earliest days of railroad transportation and regulation.

Moreover, the result in the instant case is to seriously weaken the Administrative Procedure Act and to side-step and evade the long delayed and highly desirable objectives of that legislation. In this case, the Commission has taken a long step in freeing itself of those needed safeguards and limitations which Congress intended to impose by the Administrative Procedure Act. Such arbitrary Administrative action, as here appears, should be reviewed and reversed.

The specific question of substance involved in this case is whether, in the exercise of its power to determine as a question of fact what is embraced within the service of transportation and what is outside of it, or as sometimes stated, the point of time and space at which the carrier transportation service ends, may the Commission do so in complete disregard of the evidence, basing its action on arbitrary findings and abstract general principles which not only are unsupported by the evidence but are contrary to the uncontradicted evidence of record?

The question is of paramount importance because the instant case is an illustration of how indiscriminate exercise of such a power by the Commission, motivated perhaps by an excess of zeal to eliminate abuses—and emboldened by general court approbation of its action in certain cases—may achieve quite a contrary result and lead to the very abuses sought to be eliminated.

Although this case originated as an I. & S. case, the order of the Commission is based on findings arrived at through the application, or rather misapplication of principles enunciated by the Commission in a report which was the culmination of proceedings instituted by the Com-

mission to eliminate discriminatory terminal practices by carriers and referred to as Ex Parte 104, Part II proceedings, 269 I.C.C. 11. While the propriety and validity of the principles have been repeatedly recognized by the Courts and are not questioned by Plaintiffs, it is nevertheless contended that the factual picture as revealed by the uncontradicted evidence in this case did not warrant the application thereof in the manner in which it was done by the Commission; or, to state it differently, the proper application thereof should have resulted in an order upholding the allowance tariff. The result was that instead of eliminating practices by which other industries would be discriminated against as compared with Plaintiff, Plaintiff is by all standards being discriminated against through the deprivation of service to which it is legally entitled under the line-haul rate.

The question as above formulated is predicated upon the principle laid down by the Supreme Court of the United States in *U. S.* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402; 57 S. Ct. Rep. 804, that the Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside the service provided its findings are supported by evidence. This principle has been followed by the Supreme Court in a line of cases culminating in the comparatively recent decision of *U. S.* v. *U. S. Smelting, Refining and Mining Co., et al.*, 339 U. S. 186; 70 S. Ct. Rep. 537. The principle has in some cases been differently stated; namely, that the point in time and space at which the carrier's transportation service begins and ends is a question of fact to be determined by the Commission and its findings on that question will not be disturbed by the Courts if supported by evidence.

The contention of Plaintiffs is that in the instant case the

order of the Commission violates the above principles in that its findings are not only unsupported by the evidence but are contrary to the uncontradicted evidence of the case within the meaning of evidence as defined by the Supreme Court in *Washington V and M Coach Co.* v. *Labor Board*, 301 U. S. 142; 57 S. Ct. 648; that evidence is synonymous with substantial evidence, or as more fully explained in *Consolidated Edison Co.* v. *Labor Relations Board*, 305 U. S. 197, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Bearing in mind the aforementioned tests, it is contended that the findings of the Commission as contained in its report and upon which its order is based are not only completely devoid of evidentiary support but are also contrary to the very principles announced by the Commission in its Ex Parte 104 proceedings and the various supplemental proceedings instituted in its implementation of the original Ex Parte 104 Report. This will be demonstrated in an analysis of the various findings of the Commission which follows:

The erroneous ultimate finding of the Commission that it is unlawful for the railroad (intervening plaintiff herein) to perform the service of placement and removal of cars to and from predesignated locations in plaintiff's plant is predicated upon subordinate findings which as noted are clearly not supported by substantial evidence, and in fact are contrary to the uncontradicted evidence of record. Those findings are:

> (a) The presence of industry's locomotives in the plant constituted an inherent interruption or interference prohibiting placement and removal service in a continuous movement.

There is no substantial evidence to support such a finding and conclusion. There is no evidence that in fact the industry's locomotives operated in such manner that interruption and interference were inevitable, or, that in fact it did occur. The uncontradicted evidence is that no interruption or interference with the railroad's switching did take place and the industry's operations were carefully and deliberately planned and executed so that none did or would occur. In a previous case, 269 I.C.C. 323, 336, the Commission said:

> ". . . It is said that the industry's engines did not operate over the tracks of the eastern side of the plant while respondent's engine is in the plant except while respondent's crew is at lunch or taking water. An effort, which is successful to a considerable extent, is made to keep the industry's engine doing the general plant work out of the way of respondent's engines. In the absence of evidence to the contrary, we accept it as a fact that interruption hereinafter referred to, does not occur on those tracks."

In another case, 281 I.C.C. 365, at page 370, it was stated:

> "During the test period no interference was encountered with the industry's engines because those engines did not operate at any time in the mill area and serviced the wood chain tracks only at such times as respondent's engines were not in the plant or when those engines were in the mill area."

In still another case, 266 I.C.C. 437, 447, it is stated:

> ". . . At that time, the industry was doing its own switching. Whether there would be the same lack of interference if the Illinois Central were performing the switching is problematical, but in the absence of evidence to the contrary and considering the nearness

> of the Illinois Central's yard to the several districts, the potential interference alone will not be held to be sufficient grounds to require a finding that the Illinois Central may not receive and deliver interstate traffic at the other districts at the line-haul rates."

In the latter case the Commission dismissed "potential interference" as a ground for denying the right to service at line-haul rates in the absence of showing actual interference. In our case, neither does the Report of the Commission contain findings, nor does the record contain substantial evidence of actual interference due to concurrent operation of industry and railroad power. The Hearing Examiner's proposed report contained no conclusion or finding of such interference.

(b) The weighing and reweighing of cars by the railroad on plaintiff's scales constitutes interference and interruption within the meaning of those terms as used in Propriety of Operating Practices—Terminal Services, 209 I.C.C. 11.

This finding is clearly not supported by the evidence and is contrary to the uncontradicted evidence. The evidence is uncontradicted that weighing of cars is necessary to ascertain the accurate weights upon which to assess freight charges as to all cars weighed or reweighed. (In Re: Weighing of Freight by Carriers, 28 I.C.C. 7). The Commission itself holds that carriers must assess charges on proper weights, which they must ascertain. The undisputed evidence is that the reweighing of scrap is necessary because of the debris and foreign matter in the cars (the Hearing Examiner so found) to ascertain accurate weights for freight charges. The positive and uncontradicted detailed evidence is that such weighing and reweighing was done by the railroad on the industry's scales by gratuitous

permission of the industry because, it was more advantageous, more convenient, and more economical to it, than if done on the railroad scales near or remote to plaintiff's plant. Such weighing on industry's scales was a single procedure consuming less than one minute per car, involving no extra switching but done in a continuous movement. It was weighing primarily for Plaintiff's benefit and a different type of weighing condemned in Ex Parte 104, Part II. Similar weighing as took place in Plaintiff's plant was held by the Commission to be no obstacle to the inclusion of terminal service in the line-haul rates in the following cases:

In the case of Wickwire, Inc. Terminal Allowance, 274 I.C.C. 307.

In cancellation Terminal Charges at Decatur, Illinois. 277 I.C.C. 57.

In the case of Interlake Iron Corporation Terminal Allowance, 245 I.C.C. 437.

(c) The Respondent is not obligated to deliver scrap in Yard 300, or on Track 500, or in Yard 500, or on Track 110, dependent upon the availability of space at each of the locations; variable points for delivery would require direction and control by the industry without reference to carrier's operating convenience, and in many instances, additional movement in order to reach the point of placement.

There is no substantial evidence that the circumstance of there being four distinct points of placement of scrap occasioned interference or delay in the switching of scrap. On the contrary, the evidence is clear and undisputed that the point of placement was predetermined in each instance

and that in each instance, one movement and one placement was required by the railroad. As far as the railroad was concerned, there were no *variable* points of delivery although there were *various* points of delivery. The choice of any of these points was never left to the railroad but was an industrial function which, once performed, converted such point into a fixed point involving only one movement and one placement on the part of the railroad, at its own operating convenience as to time and method.

> (d) The frequent, and what may be termed, special services in connection with switching of ingots from track 315C are for the benefit of the industry and in excess of the services respondent is obligated to perform at the line-haul rates.

This finding is not supported by substantial evidence. The procedure respecting the ingot switching is an integrated movement with other switching not found improper. It is performed completely at the railroad's convenience; without interruption and interference. It is not a proper basis for holding the entire service unlawful, particularly, since the evidence is that the ingots shipments involved are not within the scope of the usual and normal business of plaintiff. This movement was a temporary one and in fact has since been discontinued.

The questions are raised with respect to that portion of the policy providing for fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each. The result of the Commission's order is to foreclose the railroad from giving complete transportation service under the line-haul rate in a case where every effort has been made by the railroad

and the shipper to bring the service within standards prescribed by the Commission and where the facts undisputably show that the service so rendered meets such tests. The Commission by disregarding the evidence and arbitrarily decreeing such service to be in excess of that contemplated under the line-haul rate is creating a situation tending to disparage the advantages of railroad transportation and thus is embarking on a course which the National Transportation Policy sought to enjoin.

Court below fell into same error as did the Commission in failing to find that the Commission's findings and conclusions were not supported by substantial evidence and were contrary to uncontradicted evidence:

Specifically, the errors of that Court were:

(a) Finding that there was substantial evidence to support Commission's findings.

(b) That Commission's action in reaching contrary findings and conclusions to that of the Hearing Examiner were proper.

(c) Failing to find that because of the uncontradicted evidence that the railroad's service was performed at its own convenience, without direction and control of the industry, without interference and interruption by plaintiff and in a continuous movement all in accordance with the rule of conduct laid down by the Commission in Ex Parte 104, Part II, that the Commission's order lacked substantial evidence to support it and in fact, its findings were contrary to the evidence; was arbitrary and therefore invalid.

These questions, which we believe to have been decided erroneously or ignored by the Court below, are of great importance not only to the Plaintiff industry and the Railroad, but to industry and transportation as a whole. Not only are particular precuniary interests adversely affected, but long-standing, previously unchallenged industrial prac-

tices and economic balances are disrupted by the Commission's order. Accordingly, it is submitted that substantial questions are involved which call for appropriate exercise of appellate jurisdiction.

Respectfully submitted,

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Dated: August 12, 1952.

APPENDIX "A"

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil No. 10,103

COPPERWELD STEEL COMPANY, *Plaintiff*,

THE BALTIMORE & OHIO RAILROAD COMPANY,
Intervening Plaintiff,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Defendants*.

Petition to Enjoin Orders of the Interstate Commerce Commission.

Before STALEY, Circuit Judge, and GOURLEY and MARSH, District Judges.

OPINION OF THE COURT—Filed June 24, 1952

By WALLACE S. GOURLEY, *Chief District Judge*.

The matter before this Court is an action to set aside and annul an order of the Interstate Commerce Commission, entered September 28, 1951, cancelling a tariff of the Baltimore and Ohio Railroad as being in violation of Section 6 (7) (49 U.S.C.A. sec. 6 (7)) of the Interstate Commerce Act and denying the petitions of the plaintiff and intervening plaintiff to reconsider its decision.

A three-judge court was convened as required by Title 28 U.S.C.A. secs. 2284 and 2325. The case was heard on March 11, 1952 at which time all matters involved were duly considered. All issues were submitted for final adjudication.

The following facts appear from the Commission's report of December 1, 1947, and its report on further hearing of September 28, 1951, and were substantially reiterated at the hearing before this Court.

Copperweld operates a steel manufacturing plant adjacent to the right of way of the B & O within the switching limits of Warren, Ohio. The plant includes an elaborate layout of industrial tracks used for loading, unloading and switching cars of raw materials and manufactured products in its yards numbered 100, 200, 300 and 500, which are located immediately north, southeast, south and west, respectively, of the plant buildings and structures. Copperweld owns and operates three diesel locomotives, one steam engine, four locomotive cranes and a number of railroad cars of various descriptions.

The connection used by B & O to deliver cars to and remove cars from the plant leads northwestwardly from its tracks to yard 100, track 100.

Upon arrival of the train at yard 100, Copperweld's yardmaster tenders a switch list to B & O's conductor, which designates the places where inbound cars should be placed or spotted by B & O's crew. There are track scales located on track 100 where inbound cars of scrap iron are weighed. The inbound cars of scrap iron are thereafter switched by B & O engines to other tracks and other yards, from which they are thereafter moved by Copperweld's engines, and cars of other materials and empty cars are placed or spotted at various points in the plant for unloading and loading. B & O's engines likewise switch outbound empty and loaded cars from the plant to track 109 in yard 100 where the outbound train is marshaled. In the course of removal to track 109, cars loaded with ingots and produced scrap iron and cars from which scrap iron has been unloaded are weighed on track 100. Other outbound commodities are weighed by Copperweld before loading.

The suspended tariff provided that B & O would pay Copperweld $1.19 per car, with minor exceptions and modifications, for switching services performed by Copperweld beyond yard 100. The Commission in its report and order of September 28, 1951, found that tracks on yard 100 were suitable for interchange of cars between Copperweld and B & O and that the responsibility of B & O to deliver cars as a part of line-haul transportation ended at this point of interchange, and that, therefore, B & O could not law-

fully assume the obligation for the further switching and spotting of cars.

Plaintiffs have raised numerous objections to the Commission's order, but substantially these objections entertain the thesis that the findings of the Commission are not supported by the evidence and are arbitrary and beyond the power of the Commission to make.

This Court cannot assume the burden of substituting its views for those of the Commission on matters for which the Commission is especially trained and experienced, having the technical know-how and interpretive facilities at its disposal.

The point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts; and its findings on that question will not be disturbed by the courts if supported by substantial evidence on the record considered as a whole. Universal Camera Corp. *v.* N.L.R.R., 340 U.S. 474.

The facts are extremely detailed as to the numerous switching operations conducted on the premises of Copperweld.

The fact that the Commission's determination did not accept the recommendations of the examiner, was weighed in the Court's review of the Commission's substituted findings, Universal Camera Corp. *v.* N.L.R.R., supra. However, what is preserved in the record satisfactorily discloses that the Commission's substituted findings were compelling justified.

There is no doubt in our minds that there was substantial evidence upon which to predicate a conclusion that said switchings constituted an interruption of a continuous transportation movement and necessarily became a terminal operation.

The Court could not overlook the glaring incongruity of plaintiff's position. The Copperweld yards encompassed 18 miles of track. An average of 25 cars entered, and 25 cars departed from said yards each day.

Despite Copperweld's contention that the movements through its yards were continuous and uninterrupted, we

could not ignore the salient fact that the B & O Railroad employed three full crews, who were engaged not only in bringing the cars up to yard 100, but in conjunction with additional personnel of Copperweld, also devoted a substantial part of their time in facilitating the movements within the Copperweld yards. The multiplicity of switching operations conducted within these yards consumed an average of ten to sixteen hours per day on the part of the crew of the B & O Railroad.

How well the Commission utilized the evidence before it or what weight it assigned to its various parts is not a matter upon which this Court may rule. Interstate Commerce Commission et al. *v.* City of Jersey City et al., 322 U.S. 503, 512, 513. The facts in determining where transportation ceases and terminal operations begin are empiric, fluid and complex. They are not to be shifted from the shoulders of the experts commissioned to handle them to the backs of the judiciary; nor are the broad powers of judgment conferred upon the experts to be unduly hampered. Western Paper Makers' Chemical Co. et al *v.* U.S., 271 U.S. 268, 271. Correctness of reasoning, soundness of conclusion or alleged inconsistency of findings with those of prior proceedings are not to be inquired into by the courts. Virginian Ry Co. *v.* U.S., 272 U.S. 658, 665, 666.

The Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. This cause came on to be heard before a duly constituted statutory court which was convened pursuant to statute (28 U.S.C.A. Sec. 2284(1) and Sec. 2325) to hear and determine the applications.

2. By agreement of the parties the issues were submitted upon final hearing, upon the pleadings and upon the complete record of the proceedings before the Interstate Commerce Commission and the said Commission's findings and decision thereon.

3. This proceeding was brought to enjoin, set aside, annul and suspend the reports and orders of the Interstate Commerce Commission made on December 1, 1947, as modi-

fied on September 28, 1951, the proceeding known as the Investigation and Suspension Docket No. 5357, Terminal Allowance, Copperweld Steel Company, Warren, Ohio.

4. The Order of of the Commission issued on September 28, 1951, required the carrier, B & O Railroad Company, to cease and desist on or before December 17, 1951 to provide terminal service for the Copperweld Steel Company under its interstate line haul rates beyond the interchanged tracks described in the Order of the Commission on the premises of Copperweld Steel Company.

5. The Order of the Commission further provided that the B & O Railroad Company was required to cancel the schedules referred to in the Commission's report on or before November 15, 1951, such schedules relating to changes made between the B & O Railroad Company and the Copperweld Steel Company for the performance of terminal services on the premises of Copperweld Steel Company.

6. The Interstate Commerce Commission had before it substantial evidence in support of its findings.

Conclusions of Law

1. The Court has jurisdiction of this cause and of the parties thereto.

2. The Interstate Commerce Commission had jurisdiction over the proceedings wherein the said Orders of December 1, 1947 and September 28, 1951 were made, and to make the said Orders,

3. Said Orders were within the constitutional and statutory authority of the Commission, and were not arbitrary or based upon mistake of law or misapplication of the proper statutory standards. Said Orders were made by the Commission upon adequate findings supported by substantial evidence, and in accordance with the applicable law, and were and are valid and lawful in all respects.

4. The Interstate Commerce Commission has suspended the effectiveness of the orders issued from time to time, pending disposition of the questions raised in the within proceeding, the last suspension order to expire on June 25, 1952.

5. The relief prayed for in the complaint should be denied, and the suit dismissed; plaintiffs to pay the costs.

Final Decree

This cause having come on to be heard on March 11, 1952, before a duly constituted district court of three judges, and all parties being represented by counsel, and the cause having by agreement of all parties been submitted upon final hearing, upon the pleadings and upon the complete record of the proceedings before the Interstate Commerce Commission, and the Commission's findings and decision thereon; and this Court having taken the cause under advisement and considered the pleadings, the evidence, the arguments and briefs of counsel, and having on this date duly rendered its opinion sustaining the validity and lawfulness of the orders of the Interstate Commerce Commission made on December 1, 1947 and September 28, 1951, to set aside which the present suit was instituted; and this Court having duly made its findings of fact and conclusions of law, dated this day and filed herewith,

Now, Therefore, It Is Finally Determined, Ordered, Adjudged and Decreed that the relief prayed for by plaintiffs to enjoin, set aside, annul and suspend the reports and orders of the Interstate Commerce Commission, entered December 1, 1947 and September 28, 1951, is hereby denied and the suit is dismissed. Plaintiffs to pay the costs.

(S.) Wallace S. Gourley, *C.D.J.*
(S.) Rabe F. Marsh, Jr., *D.J.*
(S.) Staley, *Circuit Judge.*

Dated this 24th day of June, 1952.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 10103

COPPERWELD STEEL COMPANY, *Plaintiff-Appellant,*

and

BALTIMORE & OHIO RAILROAD COMPANY,
Intervener-Appellant

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

MOTION TO AFFIRM

Appellee, the Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the decree of the district court be affirmed.

This is a direct appeal from the final decree, entered on June 24, 1952, by a district court of three judges specially constituted pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing appellants' complaint, which sought to set aside an order made by the Interstate Commerce Commission. Appeal was allowed on August 12, 1952, and appeal papers served on the Attorney General of the United States and on the Interstate Commerce Commission on various dates from August 12 to 21, 1952.

The Commission order approved as valid by the lower court decision was entered in Investigation and Suspension Docket No. 5357, Terminal Allowance, Copperweld Steel Company, Warren, Ohio. The proceeding was instituted upon the filing of tariff schedules by respondent carrier, Baltimore & Ohio Railroad Company, to become effective August 1, 1945, whereby the railroad proposed to pay an allowance of $1.19 per car, with exceptions not here concerned, for terminal switching services to be performed by the industry, within its Warren, Ohio, plant, upon the theory that such service was a part of the obligation to deliver under the line-haul rates, and therefore the duty of the railroad to perform. Operation of the schedule was suspended by the Commission, upon its own initiative, until March 1, 1946, and thereafter by voluntary action of respondent.

The Commission consideration involved the lawfulness of the suspended tariff schedules, with particular reference to the carrier delivery obligation in respect to the Copperweld plant at Warren, Ohio. This necessarily involved determination of questions relating to what was plant service, as distinguished from respondent carrier delivery under its line-haul obligation, and involved the basic decision as to where line-haul transportation begins and ends at said plant, upon the basis of the switching conditions found to exist. Whether or not the tariff proposal to pay an allowance to the Copperweld industry, for performing the switching within its plant, to and from the point where cars were received from and delivered to the railroad, and the points of loading and unloading, was valid and lawful, depended upon whether or not that was a carrier transportation or a plant service. This decision involves application of principles established in Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues and Expenses, Part II, Terminal Services,* 209 I.C.C. 11, as approved by this Court in a number of cases.[1] Application of these

[1] *United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U.S. 402; *United States* v. *Wabash R. Co., et al.*, 321 U.S. 403; *United States* v. *Denver & Rio Grande R. Co., et al.*, 339 U.S. 186; *Hanna Furnace Corp.* v. *United States*, 323 U.S. 667, affirmed *per curiam;* and *Chicago, Burlington & Quincy R., et al.* v. *United States* (Morrell Packing Co.), affirmed *per curiam* 342 U.S. 845.

principles herein is to a proceeding under Section 15 (1) of the Interstate Commerce Act, 49 U.S.C. 15, and not to a supplemental proceeding under Ex Parte No. 104, as in the *Hanna Furnace* and *Morrell* cases below cited. Appellants' Jurisdictional Statement concedes that "propriety and validity of the principles have been repeatedly recognized by the Courts, and are not questioned by plaintiffs."

The Commission here concluded, 283 I.C.C. 327, 336, after extended investigations and two hearings, that the Baltimore & Ohio Railroad, intervener herein in support of Copperweld, which alone served the Warren plant, could not perform the spotting service at its own operating convenience, in a continuous movement without interruption or interference caused by the desires or disabilities of the industry, that such services are in excess of simple switching or team track delivery, that services performed between inbound and outbound interchange tracks in yard 100, on the one hand, and unloading and loading spots on the other, are in excess of those rendered shippers generally in receipt and delivery of traffic on team tracks or industrial sidings or spurs, that such services are plant or industrial services which respondent is not obligated to perform at line-haul rates, and, therefore, that payment of an allowance by respondent to the industry performing the service would be unlawful.

The above conclusions were based upon evidence of record compiled at two hearings, and stated in two reports, the first entered December 1, 1947, 269 I.C.C. 323, the second entered September 28, 1951, above cited. An order was entered along with each report, the first of which was set aside, upon petition of respondent and industry claiming that switching and industrial operations had materially changed since the prior hearing and report, and the proceeding was reopened for further hearing, which was held prior to the second report. For these reasons findings and conclusions in the first report are not here concerned since based upon conditions that were materially changed thereafter. The prior report is here material only as providing a detailed description of track layout in the plant, referred to in the second report, page 329, "to identify certain tracks in connection with the description of the present operations", to avoid unnecessary repetition.

Only the ultimate or required findings in the second report, as based upon changed switching conditions appearing in the record of the further hearing, are here involved, and those findings, pages 336-337, are quoted as follows:

> "We find that the existing line-haul rates of respondent must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the interchange tracks in yard 100 described of record con-

stitute such reasonably convenient points; that the common-carrier transportation which respondent is obligated to perform begins and ends at those interchange tracks; that all services beyond those tracks are in excess of those required in simple switching or team track delivery and are industrial or plant services which it is not the duty of respondent to perform; and that the performance by respondent without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant area beyond the reasonably convenient interchange tracks described, results in the Copperweld Steel Company receiving a preferential service not accorded shippers generally, and results in the refunding or remitting of a portion of the rates and charges collected, in violation of section 6 (7) of the Interstate Commerce Act."

Appellants' Jurisdictional Statement names three claimed errors of the lower court, in its decision sustaining lawfulness of the Commission order involved herein. Error is claimed in the court finding that substantial evidence supports the Commission's findings, that Commission conclusions contrary to those of the Hearing Examiner were proper, and in failing to find under the evidence claimed to show carrier operation at

its own convenience, without direction and control of industry, without interference or interruption by industry, and in a continuous movement, that the order lacked substantial evidence support, its findings were contrary to the evidence, and were arbitrary Four stated grounds are claimed to show invalidity of the Commission order, as based upon alleged findings, (a) that industry locomotives in the plant constituted inherent interruption or interference; (b) that weighing of cars by the railroad on industry scales constitutes interference and interruption under Ex Parte 104 principles, (c) that variable points for delivery of scrap would require industry direction and control, without reference to carrier operating convenience, and in many instances, additional movements, and (d) that frequent and special service in switching ingots are for industry benefit and exceed carrier obligation under its line-haul rates.

The difficulty seems to be that plaintiff has misconceived the established principles relating to terminal switching, and, in attempting to interpret the switching facts at its own plant, has assumed authority to make such fact findings as to what is plant service as distinguished from transportation service, and as to where transportation begins and ends at its plant. This may be accounted for by partisan interest inspired in part by railroad support, such as was extended to the

dispensers of great traffic involved in the many Ex Parte 104 cases decided by this Court. It is the authority of the Commission, not of the industry and carriers concerned, or even of the courts, to make such decisions upon the facts relating to switching conditions at a particular industrial plant. *United States et al.* v. *Wabash R.R., et al.*, 321 U.S. 403, 407-409.

The lower court opinion herein heard and overruled the same contentions here repeated by appellant, as referred to above, with the statement "There is no doubt in our minds that there was substantial evidence upon which to predicate a conclusion that said switching constituted an interruption of a continuous transportation movement." In considering these claims of appellant in connection with the record evidence the opinion states, "The Court could not overlook the glaring incongruity of plaintiffs' position."

That opinion is based upon facts as to switching conditions found to exist at the Copperweld plant by the Commission, as stated in its two reports above cited. These facts, referred to in the court opinion, are that Copperweld operates a steel manufacturing plant, adjacent to B. & O. tracks, within the switching limits of Warren, Ohio, with an elaborate layout of industrial tracks, receiving and switching cars of raw materials in its four plant yards, with four engines, four locomotive cranes, and a number of cars owned and operated

by the industry; that B. & O. delivers and receives cars to and from plant track 100 in yard 100, where upon arrival the plant yardmaster tenders a switch list to the B. & O. conductor, designating points where inbound loads are to be spotted; that inbound scrap iron is first weighed on industry scales in yard 100 and thereafter moved by B. & O. to other tracks and yards, from which they are later moved by industry engines, and other loaded and empty cars are spotted at unloading and loading points, and B. & O. switch outbound cars to track 109 in yard 100 where the outbound train is marshaled, with ingots and produced scrap weighed on track 100; that facts are extremely detailed as to the numerous operations conducted within the plant, as performed by three full B. & O. crews, not only bringing cars up to yard 100, but devoted a substantial part of their time in movements within the plant, the multiplicity of such switching operations averaging from ten to sixteen hours per day for the B. & O.; and that the plant had some 18 miles of tracks with an average total of 50 cars per day received and delivered.

These facts noted by the court opinion are not denied by appellant or its supporting intervener B. & O., or claimed not to be a part of the evidence of record. The lower court deemed those facts sufficient substantial support for the Commission findings upon which its order is based, and clearly they do provide that support. The two

Commission reports give a much wider consideration to facts of record, which afford more substantial support for ultimate conclusions and findings in the second report of September 28, 1951, here directly involved. That report includes much more detailed description of the plant layout, tracks, yards, buildings, and greater detail as to how the plant spotting is actually performed by B. & O. switch crews. During the proceedings and prior to the first report, 269 I.C.C. 323, 325, as there found, actual spotting services within the plant were then performed by B. & O. under contention that the service was a part of its transportation obligation, the precise question herein decided, by the Commission and the Court, to the contrary. Other switching facts noted in the two reports are, that the plant consists of numerous buildings, facilities, and railroad tracks designed as an operating integral and used in the manufacturing operations; that the five tracks of yard 100, through which all traffic enters and leaves the plant, range in length from 1190 to 2200 feet; that in March 1950 a total of 760 inbound cars and 527 outbound, a grand total of 1287, were delivered to and received from the plant, involving weighing, storing, and spotting of movements as described in detail; that inbound shipments consisted largely of scrap iron, 83.3 percent in March 1950, each car of which was weighed loaded and reweighed empty as described, and later switched to yard 300

for unloading up to its capacity, with remaining cars switched to track 500, 110 in yard 100, and track 310 as directed by the plant switch list; and that about 12 cars of ingots per day were moved from a short track, of two-car loading capacity, stemming from track 315C, thus involving multiple movement from that track to other hold tracks, including track 109 in yard 100 where outbound trains are marshaled during the time of plant spotting. The ingot movement to track 109 is not included in facts considered by the lower court or the Commission reports, the evidence of which is the voluminous detailed report of exact car movements, made by Commission agents from actual check, a part of the hearing record (Exhibits 30-33) which was submitted to the lower court.

The Commission based its report conclusions and findings, in part, on evidence of plant disability, particularly as to lack of capacity of yard 300 to receive scrap iron shipments when delivered in yard 100, and the 2-car loading capacity for ingots which necessitated repeated movements to that point, in spotting empty cars, and from there to assemble loaded cars for outbound trains. Evidence of multiple movement of cars within the plant, due to this plant disability, and to the split-up of inbound trains in weighing of scrap and to the assembly cars for outbound trains, provides additional substantial support for the report find-

ings, as has been repeatedly recognized by this Court as the type of evidence sufficient for legal requirements. *United States* v. *American Sheet & Tin Plate Co., et. al.*, 301 U.S. 402; *United States* v. *U.S. Smelting Co., et al.* (*Denver & Rio Grande R. Co., et al.* v. *U.S.*), 339 U.S. 186. The second Commission report, page 335, carefully considered the weighing process at the Copperweld plant and the reasons therefor, concluding that weighing, even though provided for in carrier tariffs break "the continuity of the movement to and from unloading and loading points," that the reweighing of inbound scrap is for industry benefit and constitutes interference and interruption, under principles established in Ex Parte No. 104, 209 I.C.C. 11. Those are the principles consistently and universally approved by this Court, in the many cases decided in accordance with and since *United States* v. *American Sheet & Tin Plate Co.*

The above is deemed sufficient to require all contentions of appellants herein to be overruled. Some of those contentions however deserve further explanation. The first claim of insufficient evidence support for findings, as set forth in the Jurisdictional Statement, (a) relates to an alleged finding that "the presence of industry's locomotives in the plant constituted an inherent interruption or interference prohibiting placement and removal service in a continuous move-

ment." As so stated that is neither a subordinate nor ultimate report finding. Reference is undoubtedly to the general discussion in the second report, page 332, to industry operation in the plant of four engines, four locomotive cranes, and other equipment, some in operation for 24 hours per day, and the tracks over which some of the switching is performed. Appellants claim there is no evidence to show industry engine operations causing interruption or interference, that such a result did occur, and the report did not make any such finding. It is supposed that in the situation here involved, where industry controlled its own engine operations and directed the plant switching of the B. & O. engines, through oral and written instructions issued by its yardmaster, the plant services so closely coordinated under industry control would avoid interference as between the various engines performing the service. Such coordination and direction of carrier switching by industries has been repeatedly held to be evidence of standby railroad engine service in plant spotting one of the principal fact standards, as applied in Ex Parte 104 supplemental proceedings, upon which carrier plant spotting has been condemned by the Commission and Courts. What the report stated herein was not a finding as appellants claim, but rather a general comment, unimportant if not unnecessary to the conclusions and findings made, to the effect that interference

by industry power is inherent where switching is performed by carrier and industry concurrently. And that is legally correct where, as here, the switching of both is coordinated under the direction and control of industry.

The Jurisdictional Statement also contends that it was error to hold that Commission findings and conclusions contrary to those of the Hearing Examiner were proper. This relates only to the weighing of scrap, claimed to be a finding without evidence support, as set forth in contention (b). The question as to weighing has been discussed above. There is a difference in the Commission conclusions and findings from those of the Hearing Examiner, in respect to switching scrap iron, particularly as to weighing. The second report, page 327, in the beginning, notes that conclusions therein differ in part from those recommended by the examiner. This simply means that appellants hopefully rely upon this difference to procure a decision by this Court invalidating the order involved, upon the clearly erroneous theory that a recommended examiner finding is the final legal decision, under application of the Interstate Commerce Act, which cannot be overruled by the Commission. That is untenable and contrary to all previous interpretation and understanding of the purpose of Congress in vesting final administrative authority in the Commission. Approval of such a theory is not to be found in court decisions.

Appellants cite no court opinion which holds that an examiner has final authority, superior to the Commission, to decide cases under the Interstate Commerce Act, unless the reference to *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, is intended as such. The opinion in that case does not include any such holding. It does hold that the examiner decision must be considered in the administrative appeal action, and that is affirmatively shown herein. This the lower court held was "compellingly justified" by the record, under the *Universal Camera Corp.* opinion. The Public Utilities Commission of Ohio joined in the Commission hearings herein, and by its order of October 30, 1951, a part of the record before the Court, prohibited carrier switching within the Copperweld plant, practically as did the Commission order here involved.

The order herein sought to be enjoined and annulled was entered on the same day as the second report, September 25, 1951, and requires the respondent-carrier to cease and desist from performing services, held in the report not to be a part of its transportation obligation under line-haul rates, and to cancel the tariff schedules proposing to pay Copperweld an allowance for performance of the same service, held to be industry service.

Appeal herein presents no new questions, or questions that have been decided differently by the courts. The questions herein have been con-

sistently decided contrary to contentions of appellants in this appeal, and other appeal cases where the lower courts sustained similar Commission orders, as in *John Morrell & Company*, 280 I.C.C. 419, the last such appeal, *Chicago, Burlington & Quincy R.R. Co., et al.* v. *United States, et al., supra*, where a motion to affirm, such as here submitted, was granted.

The only real issue raised by this litigation is whether or not the record as a whole supports the Commission findings and order. The District Court after careful examination of the entire record found (Find. No. 6) that the Commission had before it substantial evidence in support of its findings. The decree should be affirmed.

ALLEN CRENSHAW,
Acting Chief Counsel,
Interstate Commerce Commission.

September, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No.

COPPERWELD STEEL COMPANY and
BALTIMORE & OHIO RAILROAD COMPANY

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Western District of Pennsylvania

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MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MOTION TO AFFIRM OF THE INTERSTATE COMMERCE COMMISSION

This appeal is from a decree of a specially constituted three-judge court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission. The appeal has been docketed and a motion to affirm the decree of the district court, filed by the Interstate Commerce Commis-

sion, is pending. The United States believes that the appeal presents no substantial question warranting a hearing before this Court and that the motion of the Interstate Commerce Commission should accordingly be granted.

The order of the Commission challenged by appellants required the cancellation of tariff provisions whereby appellant Baltimore & Ohio Railroad Company undertook to pay appellant Copperweld Steel Company terminal allowances of $1.19 per car for services performed by the latter company. The order was predicated upon ultimate findings by the Commission to the effect that the line-haul rates did not cover the services in question; that those services were not transportation services, but plant or industry services beyond the common carrier obligation; and that payment of allowances by the railroad to the industry resulted in an unlawful preference. The general legal principles involved have been considered by this Court on numerous occasions since the Commission undertook its general investigation of carriers' practices in respect of terminal services (*Ex parte 104*, 209 I.C.C. 11) some 17 years ago.[1] They were recently summarized in *United States* v. *United States Smelting Co.*, 339 U.S. 186, 189-190, as follows:

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[1] While the instant proceeding is not supplemental to the Commission's *Ex parte 104* proceeding, the principles involved in that case clearly govern here. Appellants fully recognize this in their Statement as to Jurisdiction.

The Commission undertook its general investigation, *Ex parte 104*, in the interest of establishing a uniform and equal service for shippers. The Commission concluded that carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee's plant. This delivery is such as may be accomplished in one continuous movement without "interruption" occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching. In the Commission's view as developed in *Ex parte 104*, such a convenient delivery point marks the beginning and end of what is termed "line-haul" transportation, and is the extent of the service which may be performed under the line-haul rate. The Commission's authority to determine the point where transportation duty ends and industry convenience begins was upheld by this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402. We have repeatedly sustained the Commission in its application of *Ex parte 104* principles to particular plants where it has prohibited the performance of services beyond the point fixed under a line-haul rate. In issuing cease and desist orders in these cases the Commission has acted pursuant to

its duty to enforce § 6(7) of the Interstate Commerce Act, which section prohibits departure from filed tariffs and the rendering of preferential services.

In the instant case, the Commission found that certain designated tracks in Copperweld's yards are suitable for interchange of cars between the B. & O. and the plant; that the nature of the plant layout and the operations performed in Copperweld's yards (including extensive switching activities performed by industry-owned locomotives) are of such character that performance beyond the designated point cannot be accomplished as part of a continuous movement, free from industry interruption and interference; and that the services performed beyond those designated interchange tracks are not the equivalent of simple placement switching, but are specialized plant services performed for the convenience of the industry. Appellants' case comes down to the contention that these findings were arbitrary and capricious and without adequate evidentiary support.

As a reading of the careful opinion of the district court makes plain, the findings and the record have been fully examined by that court. We shall not attempt in this memorandum to recreate the picture of Copperweld's physical layout or to describe the varied and complicated

operations which take place along the 18 miles of industry track encompassed in its yards. We would, however, invite the Court's attention to the striking contrast between the claim of appellants that there was no supporting evidence for the Commission's findings and the conclusions of the three-judge court, reached after an examination of the evidence. Following a discussion of operations which take place in Copperweld's yards, the district court stated:

> There is no doubt in our minds that there was substantial evidence upon which to predicate a conclusion that said switchings constituted an interruption of a continuous transportation movement and necessarily became a terminal operation.
>
> The Court could not overlook the glaring incongruity of plaintiffs' position. The Copperweld yards encompassed 18 miles of track. An average of 25 cars entered, and 25 cars departed from said yards each day.
>
> Despite Copperweld's contention that the movements through its yards were continuous and uninterrupted, we could not ignore the salient fact that the B & O Railroad employed three full crews, who were engaged not only in bringing the cars up to yard 100, but in conjunction with additional personnel of Copperweld, also devoted a substantial part of their

time in facilitating the movements within the Copperweld yards. The multiplicity of switching operations conducted within these yards consumed an average of ten to sixteen hours per day on the part of the crew of the B & O Railroad.

The above-recited facts, without more, indicate the extravagance of appellants' claim that the operations in Copperweld's yards amounted to no more than simple placement switching.

The highly technical question before the Commission—where, at a particular plant, line-haul transportation ends and operation for the industry's convenience begins—is one which the Commission is specially qualified to answer, as this Court has frequently emphasized in cases arising out of the Commission's *Ex parte 104* proceeding. We do not suggest that the administrative record made in such a case should not be carefully scrutinized by the judiciary in order to determine whether the Commission's order has a rational basis. But when such a record has been carefully examined by a district court of three judges and the conclusions of the Commission found to be "compellingly justified" by the evidence, it would scarcely appear that there is any substantial question warranting a further hearing by this Court.[2]

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[2] Since this Court's decision in *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402, approximately 35 orders

For the foregoing reasons, it is respectfully submitted that the motion of the Interstate Commerce Commission to affirm the decree of the distract court should be granted.

ROBERT L. STERN,
Acting Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

RALPH S. SPRITZER,
Special Assistant to the Attorney General.

SEPTEMBER, 1952.

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issued in supplemental *Ex parte* 104 proceedings have been reviewed by the courts. All have been sustained. The most recent order examined by this Court was sustained on motion to affirm in *Chicago, Burlington & Quincy R. Co.* v. *United States*, 342 U.S. 845.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.

COPPERWELD STEEL COMPANY and BALTIMORE & OHIO RAILROAD COMPANY,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

On Appeal From the United States District Court for the Western District of Pennsylvania.

BRIEF OF APPELLANT COPPERWELD STEEL COMPANY IN OPPOSITION TO MOTION TO AFFIRM.

STATEMENT.

Appellants Copperweld Steel Company and Baltimore & Ohio Railroad Company filed their joint Statement as to Jurisdiction under Rule 12 of this Court under date of August 12, 1952. The Interstate Commerce Commission,

Defendant-Appellee, filed its Motion to Affirm the decree of the three-judge statutory court below on September 8, 1952.

The instant Brief of Appellant Copperweld Steel Company in opposition to the Motion to Affirm is in response to the Motion and will disclose the basis and reasons for the denial of the Motion, as well as the important reason for review by this Court.

ARGUMENT.

The questions decided by the Interstate Commerce Commission and approved by the three-judge statutory court below (upon at least a partial misapprehension of the facts as recited in that Court's opinion and discussed below) are of substantial importance to the nation's railroads and to industry in general. A reading of the Motion to Affirm, filed here on behalf of the Interstate Commerce Commission, discloses many inaccuracies of facts, and implicit arguments based thereon which, we believe, were erroneously accepted by the Commission and the Court below.

This case involves a modern steel plant with its trackage, yards, and scales especially designed, [in cooperation with impartial experts], for the very purpose of adhering to and conforming with the applicable rules and principles of the Interstate Commerce Commission in this class of cases. A clarification of those principles, in the light of the facts and circumstances involved here, is needed, we submit, in the interests of all parties.

A clarification of the principles of the Administrative Procedure Act, as that act is applicable to the practices of the Interstate Commerce Commission, would appear to be highly desirable in the light of the Commission's decision herein. The Commission's decision here in effect ignores the Examiner's findings, ignores a substantial part of the detailed and undisputed evidence, and is based upon general conclusions, summary in fashion, *which are not supported*

by the evidence, and, indeed, are contrary to the evidence. This question alone, it is submitted, justifies review by this Court.

The instant case is not just another decision in the line of cases beginning some seventeen years ago with *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, as Government counsel would have this Court believe, but represents a situation in which the Interstate Commerce Commission has extended furtherest its proclaimed doctrine of disallowance of terminal services by carriers to any but the simplest team track switching. Moreover, in the instant case the Commission's final order effectively denies to appellant industry any switching and placement service of inbound and/or outbound cars; the Commission's order is contrary to the findings and recommendations of its own Examiners who heard the evidence and were most familiar with the facts involved;[1] and the Commission's order should be enjoined and set aside for lack of substantial evidence.

The undisputed facts are that the industry here, at the outset of its industrial operations, working in cooperation with the engineering department of the carrier did, in the years 1942, 1943, and 1944, design, lay out, and construct the industry's tracks and yards for the very purpose of complying with the Interstate Commerce Commission's principles and rules as announced and enforced in its proceedings known as Ex parte 104, 209 I. C. C. 11, affirmed by this Court in the *American Sheet & Tin Plate* case, supra, and other cases. This Court should recognize the difference between such a case and the score of cases

[1] Although requested, no argument was ever permitted before any members of the Commission and the Final Report of Division Three, upon which the Commission's final order is based, represents in large part a rejection of the Examiner's findings and final conclusions and is clearly contrary to the evidence and to the findings of the Examiner.

passed upon by the Courts wherein the yards and tracks of the industries involved had grown up and been added to over many years of piece-meal construction. In short, appellant industry's yards, tracks, and points of delivery and pickup were in the first instance especially and carefully designed to meet the precise rules and principles previously announced by the Commission and this Court in the line of cases referred to in Appellant's Statement as to Jurisdiction and by Appellee Counsel in the Motion to Affirm. Also, the record supports Appellant industry's representations here that its plant practices conformed to the Commission's rules and principles in this class of cases.

Furthermore, in most of the decided cases the industries and plant yards and tracks were served by more than one carrier. Here, the single carrier involved, working closely with the industry, had carefully and deliberately taken all steps to comply with the Commission's principles and rulings.

The Interstate Commerce Commission, in its Motion to Affirm, has gone to great, and, we submit, questionable lengths and representations to avoid review by this Court. For example, while the Commission's basic, primary, and general finding and conclusion herein (and contrary to the Examiner's findings) that "Interference by industry power or equipment is inherent where, as here, switching is being performed concurrently by respondent (railroad) and the industry." *was plainly a Commission finding in support of its conclusions and order,* counsel for the Commission here attempts to avoid the weakness of the Commission's position by designating the above-quoted finding and conclusion as "neither a subordinate nor ultimate report finding." (Motion to Affirm, page 10). We submit that a Government agency should be more interested in a correct and proper application of the governing principles rather than an attempt to win all of its cases.

Another instance of such a representation by Commission counsel appears on page 10 of its Motion to Affirm wherein it is stated:

> "It is supposed that in the situation here involved, where industry controlled its own engine operations and directed the plant switching of the B. & O. engines, through oral and written instructions issued by its yardmaster, the plant services so closely coordinated under industry control would avoid interference as between the various engines performing the service. Such coordination and direction of carrier switching by industries has been repeatedly held to be evidence of standby railroad engine service in plant spotting one of the principal fact standards, as applied in Ex parte 104 supplemental proceedings, upon which carrier plant spotting has been condemned by the Commission and Courts. What the report stated herein *was not a finding as appellants claim*, but rather a general comment, unimportant if not unnecessary to the conclusions and findings made, to the effect that interference by industry power is inherent where switching is performed by carrier and industry concurrently. And that is legally correct where, as here, the switching of both is coordinated under the direction and control of industry." (Emphasis supplied)

The true and undisputed facts are that in four days of meticulous inspection by three Commission inspectors who checked every car from 7:45 a. m. until 4:30 p. m. covering the minute to minute movement of the B. & O. locomotive, the Copperweld locomotive, the B. & O. cars and the Copperweld cars, their report shows that in these four days there was only one instance when the B. & O. locomotive had to stop because of the interference or presence of the Copperweld equipment and that one instance lasted for seven minutes. (Exhibit 31). Such an incident is far from the inherent interference inferred by the Commission in the present case and far from the typical circumstances present in other cases decided by the Commission and the Courts.

Moreover, the "plant spotting" to which Counsel ingeniously refers is done by *industry* power and equipment, whereas the carrier *placement* and *pickup* is done by the carrier crews *at their own convenience,* and not "under the direction and control of the industry," as is done in any simple or team-track switching.

We submit that both Counsel's representations of the facts and the argument based thereon are untenable, contrary to the evidence, and, under the circumstances, specious and misleading.[2]

But, more important than Counsel's representations and arguments, as disclosed, is the question of whether in all cases where there may be present in the industry yards some industry motive power and equipment, although meticulously operated, according to plan, as here, without interference or interruption to carrier switching, the Commission, nevertheless, has the right to infer "inherent interference and interruption," in the face of uncontradicted evidence that there was no actual interference by industry operation with the railroad movements,[3] and thereby de-

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[2] Another misstatement appears on page 7 of the Motion to Affirm wherein it is stated that "as to the numerous operations conducted within the plant, as performed by three full B. & O. crews." Commission Counsel is well aware that for the period covered by the Commission's report and decision there were only two B. & O. crews or tricks, as found by the Commission's final Report of September 28, 1951, and as conceded at the argument in the Court below. Also, the Court below fell into the same misapprehension and recited such erroneous statements in the Court's opinion. Thus the very basis of the Court's decision rests upon a substantial misapprehension and error and this is another reason, we believe, why this Court should re-examine the principles involved here for the guidance of the Commission and the nation's railroads and industry.

[3] The Commission Examiner made no finding that industry operations interfered with railroad operations, but, on the contrary, specifically found that:

> "The evidence clearly demonstrates that, except as to ingots loaded on track 315C, respondent is able to and does receive outbound loaded cars at the loading spots at its own operating

prive the industry of all placement, pickup, and switching services by the carrier. Certainly, that is the result of the Commission's order here and, we believe, will be the Commission's policy in future cases if this decision is allowed to stand. We submit, the industry and the railroads of the nation are entitled to have this important question clearly settled and the matter clarified in the interests of all parties concerned.

Another question of importance to the nation's railroads and industry in the instant case is the practice of weighing by the carrier on the industry's scales, operated by a sworn weighmaster subject to the supervision of the Association of Eastern Railroads' Agency, known as the Eastern Weighing and Inspection Bureau. Following universally recognized practices, approved by the Commission itself, the carrier here has on file with the Interstate Commerce Commission a tariff which permits the consignee as a matter of right to request the reweighing of the lading on which freight charges are assessed. The Hearing Examiner found, and the evidence is undisputed, that the reweighing of scrap (the industry's largest inbound volume of freight) is necessary because of the debris and foreign matter in the cars *in order to ascertain accurate weights for freight charges.* Use by the industry of these weights for commercial purposes is incidental to railroad weighing and industry would be entitled to their use even though weighed by the railroad at various points on its own scales. More-

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convenience and without interference or interruption caused by the industry; that, except as to inbound carloads of scrap, respondent is able to and does deliver inbound loaded cars to the points of unloading at its own operating convenience and without interferenee or interruption due to the desires or disabilities of the industry; that there is no apparent necessity to coordinate respondent's switching with the operation of the plant except as noted above; and that the service performed by respondent in the receipt and delivery of carload freight, except on the traffic described, does not exceed the equivalent of team track or simple switch placement."

over, as to the outbound cars which are tendered to the railroad without weights, the railroad is obligated to ascertain the weights upon which to assess freight charges, even though the industry uses these weights for invoice purposes.

In the construction of its modern yards the industry here constructed modern railroad scales at the very entrance to the plant property on the track leading from the carrier's main line. Under the Commission approved tariffs, plaintiff industry requested the carrier to reweigh all cars of scrap consigned to the industry. In accordance with the provisions of that tariff, if the discrepancy is *within* what is referred to as the weight tolerance, the industry pays the carrier the charge designated in the tariff for that weighing service; if the discrepancy *exceeds* the tolerance provided for by the tariff, then the industry does not pay for the weighing service and the freight charge is computed in accordance with the weight shown on the reweighing, all in accordance with the approved tariff except that a charge is made under the tariff as above described.

Such type of weighing and reweighing is included in the line-haul freight rate under long established and approved Commission practice.

The positive and uncontradicted detailed evidence is that such weighing and reweighing were done by the railroad on the industry's scales by permission of the industry because it was more advantageous, more convenient, and more economical to the carrier, than if done on the railroad scales near to or remote from plaintiff industry's plant. The evidence further discloses that weighing at any other point by the carrier would have been many times more costly to the carrier and would have involved delays, in many instances of twelve hours or more, as well as other delays due to marshalling cars for the purpose of such weighing at different railroad scales enroute to plaintiff industry's yards.

The weighing was without question for the appellant carrier's benefit and a very different type of weighing than that condemned in Ex parte 104, Part II. It is also true that the kind of weighing that took place in appellant's plant here was held by the Commission to be no obstacle to the inclusion of terminal service in the line-haul rates in the following cases:

In the case of Wickwire, Inc., Terminal Allowance, 274 I. C. C. 307.
In Cancellation Terminal Charges at Decatur, Illinois, 277 I. C. C. 57.
In the case of Interlake Iron Corporation Terminal Allowance, 245 I. C. C. 437.

Thus we believe and submit it will be seen that the summary and arbitrary action by the Commission regarding the weighing in the instant case, are the result of reliance upon the same type of superficial and inaccurate statements as appear in the Commission's Motion to Affirm before this Court.

The third important question as erroneously decided by the Commission and the Court below is that the carrier was not obligated to deliver scrap in Yard 300, or on Track 500, or in Yard 500, or on Track 110, dependent upon the availability of space at each of the locations; that variable points for delivery would require direction and control by the industry without reference to carrier's operating convenience, and in many instances, additional movement in order to reach the point of placement.

There is no substantial evidence that the circumstance of there being four distinct points of placement of scrap occasioned interference or delay in the delivery and placement of scrap. On the contrary, the evidence is clear and undisputed that the point of placement was predetermined in each instance and that in each instance, one movement and one placement only was required to be made by the railroad. As far as the railroad was concerned, there were no *variable* points of delivery although there were *various*

points of delivery. The choice of any of these yards or tracks was never left to the railroad but was an industrial function, which once performed, converted such point into a fixed point involving only one movement and one placement on the part of the railroad, at its own operating convenience as to time and method.

Such a designation by the industry yardmaster on a written switch list of the yard of delivery when the freight cars first arrived at the industry plant did not result in *variable* points of delivery. Such designation of a delivery point is in reality no different from the designation of separate warehouse doors or unloading stations at the smallest industry siding or team track. Actually, the predetermined point of scrap delivery involved here resulted in a smooth plan of operation, at the carrier's convenience, and certainly with no interference, interruption, or delays by industry motive power or equipment, or otherwise.

It is thus clear (and contrary to what Commission Counsel would have this Court believe) that there are no *variable* points of delivery which resulted in "evidence of plant disability" and "evidence of multiple movement of cars within the plant." (Motion to Affirm, page 9). Such an argument and conclusion is clearly unsupported by the evidence, contrary to the evidence, and contrary to the Hearing Examiner's findings.

The fourth question, and one on which Commission Counsel heavily dwelt on in his Motion to Affirm (page 8 and 9), has now become moot by reason of the industry's discontinuance of the manufacture and shipment of this type of steel. Again taking a summary view of the circumstances involving the movement of cars for the loading of ingots on one special track (315C), the Commission ignored the determining factor that the ingot switching, when done by the carrier, was always done as a part of an integrated movement with other switching not found to be improper,

and performed completely at the carrier's convenience. Any other placement of empties for ingot loading or removal of loaded cars of ingots was done by the industry motive power. Thus, this particular finding and conclusion of the Commission properly should be removed from this Court's consideration as a basis either for affirmance or reversal of the decision.

It is regretted, but it appears necessary to call attention to other instances of lack of candor and erroneous statements in the Motion to Affirm. On page 11, Commission Counsel assert that appellant's contend: "that a recommended examiner finding is the final legal decision, under application of the Interstate Commerce Act, which cannot be overruled by the Commission. That is untenable and contrary to all previous interpretation and understanding of the purpose of Congress in vesting final administrative authority in the Commission. Approval of such a theory is not to be found in court decisions."

Such a statement by Commission Counsel is clearly beyond the bounds of fairness and can only serve to confuse the issues before this Court. Appellant industry most seriously maintains that the Commission in the instant case clearly failed to recognize and to apply the principles stated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. Plaintiff appellant also most seriously urges that the Court below fell into the same error, induced by similar inappropriate representations of Commission Counsel, and that error and misapplication of the principles of the Administrative Procedure Act by the Interstate Commerce Commission in this and similar cases should be reviewed and examined by this Court in the interests of all parties concerned.

Another instance of specious and unwarranted representation by Commission Counsel appears in the Motion to Affirm, at pages 5-6, wherein it is stated that:

> "... plaintiff has misconceived the established principles relating to terminal switching, and, in attempt-

ing to interpret the switching facts at its own plant, has assumed authority to make such fact findings as to what is plant service as distinguished from transportation service, and as to where transportation begins and ends at its plant. This may be accounted for by partisan interest inspired in part by railroad support, such as has extended to the dispensers of great traffic involved in the many Ex parte 104 cases decided by this Court. It is the authority of the Commission, not of the industry and carriers concerned, or even of the courts, to make such decisions upon the facts relating to switching conditions at a particular industrial plant. United States et al. v. Wabash R. R., et al, 321 U. S. 403, 407-409."

What Commission Counsel means by partisan interest of the industry is not clear, for obviously the industry is interested in receiving complete transportation, including lawful terminal switching. It neither misconceived the principles applicable nor assumed the prerogative of the Commission. It knows the factual situation at its plant as well as the Commission. It has undertaken to apply the established principles to these facts (which are of record), logically and reasonably. The Commission and its Counsel have applied general abstract principles not to the precise factual situation of record but to assumed general factual situations experienced in other Ex Parte 104 cases which this Court has affirmed, facts different from those in this case. Hence, we insist with complete justification that the Commission's decision is contrary to the evidence in this case, not supported by established evidence, and contrary to law.

The statement that our alleged misconception and alleged erroneous assumptions are in part railroad inspired, with the implication that that is so because we dispense traffic, is, we submit, unfair and unwarranted. The Baltimore and Ohio Railroad is the only carrier serving the plaintiff industry's plant, is the only carrier which would necessarily carry and route all traffic originating at and delivered to the plant, and nothing in the record or the circumstances

of the traffic movement supports Counsel's implicit charges.

A further and real consideration, of which it is believed this Court should take notice in this case, is the declared National Transportation Policy as embodied in 54 Stat. 899, preceding Section 1 of the Interstate Commerce Act, 49 U. S. C. par. 1.

The questions here are raised with respect to that portion of the policy providing for fair and impartial regulation of all modes of transportation subject to the provisions of the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each. The result of the Commission's order is to foreclose the industry from receiving from the railroad complete transportation service which is inherently best suited to its needs under present conditions under the line-haul rate, in a case such as this where every effort has been made by the railroad and the shipper to bring the service within standards prescribed by the Commission and where the facts undisputably show that the service so rendered meets such tests. The Commission, by disregarding the evidence and arbitrarily decreeing such service to be in excess of that contemplated under the line-haul rate, is creating a situation tending to disparage the advantages of railroad transportation to this industry, and thus is embarking on a course which the National Transportation Policy sought to enjoin.

The tenor of the motion to affirm filed in this case demonstrates the propriety of appellant's observations in its Statement as to Jurisdiction wherein in pointing out the importance of the questions presented by the appeal, appellant stated:

> "The question is of paramount importance because the instant case is an illustration of how indiscriminate exercise of such a power by the Commission, motivated perhaps by an excess of zeal to eliminate abuses—and emboldened by general court approbation of its action in certain cases—may achieve quite a contrary result and lead to the very abuses sought to be eliminated."

Thus the Commission in support of its motion to affirm cites at page 6 the pronouncement of this Court in *United States et al.* v. *Wabash Railroad et al.*, 321 U. S. 403, as the seeming authority for the uncontrolled power of the Commission to determine "the point of time and space at which the carrier's transportation service ends" even to the exclusion of the Courts, *but fails to point out the limits* upon that power imposed by this Court in the cited case and in other cases, namely, that "its findings on that question will not be disturbed if supported by the evidence".

Although appellant concedes the power of the Commission to so determine transportation if validly exercised, appellant contends that in the instant case the exercise by the Commission of that power was in disregard of the safeguards imposed upon it by the Court in that its findings forming the basis for its determination were not supported and were arbitrary.

Although for jurisdictional purposes appellant has advanced such want of evidentiary support as its main ground for appeal, appellant submits that the importance of this case is far greater than in the mere testing of the correctness of a Commission decision. It should be borne in mind that the facts as disclosed by the evidence and as they describe the operations of this railroad with relation to the industry involved are uncontradicted. The question presents itself whether the Commission may hold virtually as a matter of law that a plant operating in a manner disclosed by such uncontradicted evidence is not entitled to terminal switching as part of the line haul rate. Particularly the following questions present themselves:

1. The uncontradicted evidence being to the effect that appellant industry has its own motive power which operates concurrently with railroad power and that such concurrent operation takes place without industry power interfering with railroad power, under such circumstances may the Commission as a matter of law deny appellant industry terminal switching on a theory of inherent interfer-

ence—a theory which the Commission itself has disclaimed in cases decided by it? If so, this appellant industry and other industries similarly situated are entitled to a clarification by this Court.

2. The evidence being uncontradicted that the weighing performed by the railroad on the industry scale is of the type which the railroad by its tariff provisions would be bound to perform under the line-haul rates if performed by it on its own scale; the evidence further showing the weighing on industry scale to be more economical and more time saving than if performed on the railroad scale, and consequently for the railroad's benefit: under such circumstances may the Commission hold that the mere circumstance of the weighing taking place on the industry scale creates an interruption and interference rendering the terminal switching an industry operation? If so, this industry and other industries similarly situated are entitled to a clarification by this Court.

3. The evidence being uncontradicted that the placement of inbound scrap takes place at four predetermined locations and that the determination of these locations is never left to the railroad in the sense that it would entail delay or interruption of movement, under such circumstances may the railroad on the mere ground of their being more than one place of delivery of the same commodity deny to industry terminal switching? This is likewise a question that requires clarification by this Court.

4. With respect to outbound ingots the evidence being undisputed that although several switches were made of cars in a day's operation, such switching was integrated with other switching in the vicinity and there being no evidence of delay specifically occasioned by such multiple switching; under such circumstances may the railroad deny to the industry terminal switching of outbound ingots and, if such denial be warranted, may the industry operation be

penalized by being denied switching with respect to inbound and outbound shipments generally?

All these questions are questions of substance and should not be summarily disposed of by a motion to affirm as requested by Appellee.

Finally, in reply to the contention that the Statutory Court carefully examined the evidence and found it to afford substantial support for the Commission's findings, it is respectfully submitted that although the Court may have read the evidence it was influenced in its decision less by the evidence of record than by an erroneous statement made in the course of the oral argument by the Commission's Counsel, to the effect that the Railroad employed three crews—which in fact it did employ at a time subsequent to that covered by the hearing and testimony—implying the necessity of that number of crews to handle the volume of freight disclosed by the evidence to have been handled at a time when only two crews were employed. This erroneous finding—the only specific finding of fact made by the Court—was virtually used by the Court as its "ratio decidendi" for sanctioning the Commission's order. Thus the entire decision of the Court rests on a conception of a nonexistent factual situation and raises a valid doubt as to the accuracy of the Court's conclusion generally of evidential support of the Commission's findings.

For these reasons it is urged that the motion to affirm should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 358

COPPERWELD STEEL COMPANY,
Plaintiff-Appellant,

AND

THE BALTIMORE & OHIO RAILROAD COMPANY,
Intervener-Appellant,

VS.

UNITED STATES OF AMERICA,

AND

INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF OF INTERVENER-APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

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The Daily Record Co., Baltimore 3, Md.

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PRELIMINARY STATEMENT

This case is pending on direct appeal from a final decree of a statutory three-judge United States District Court for the Western District of Pennsylvania dismissing the complaint of appellant, Copperweld Steel Co.,[1] in an action

[1] Sometimes afterward referred to as the industry.

brought to set aside and annul an order of the Interstate Commerce Commission which directed The Baltimore and Ohio Railroad Company,[2] intervener-appellant, to cancel tariffs by which they proposed to pay the appellant an allowance for performing for the railroad's account car switching at the appellant's plant in Warren, Ohio.[3]

QUESTION PRESENTED

At the outset, appellant railroad points out that it has regarded the appellant industry's plant at Warren, Ohio, free from any disability within the meaning of the principles developed in Ex Parte 104, Part II, *Propriety of Operating Practices — Terminal Services,* 209 I.C.C. 11 (1935) and subsequent cases, which would preclude the railroad from performing switching services at the line-haul rate.

The Commission counsel in the Motion to Affirm apparently imputes to the railroad improper motives for its performance of terminal switching services at the industry's plant and for its support of the industry's position in this case, because superficially it appears the railroad will benefit from being relieved of the obligation to perform the terminal switching service. Because of this inference the railroad feels it necessary to bring to the attention of the Court the circumstances which motivate its action.

The railroad feels it has the duty, and the right, to perform a complete transportation service at the line-haul

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[2] Sometimes afterward referred to as the railroad.

[3] There is no question as to the propriety of the railroad paying an allowance to the industry in lieu of performing the terminal switching service. Interstate Commerce Act, 34 Stat. 590 (1906) as amended, 49 U.S.C. Sec. 15, par. (13); *United States v. Balto. & Ohio R.R. Co.,* 231 U.S. 274 (1913). The amount of the allowance has been found reasonable by the Interstate Commerce Commission. *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 269 I.C.C. 323 (1947).

rate, including receipt and delivery of freight at reasonably convenient locations within the plant. Railroads today are operating in a highly competitive field. Motor carrier competitors, without restraint or restriction, can and do perform a complete transportation service including plant platform receipt and delivery of freight.

The *Ex Parte 104* principles, promulgated by the Commission as a guide or rule of conduct for railroads, have been interpreted by the appellant railroad as not precluding the complete transportation service mentioned, including placement and removal of cars from reasonably convenient locations in the industry's plant under the line-haul rates.[4] The railroad considers such service as fulfillment of its common carrier duty since it is satisfied the plant is free of physical disabilities and the switching could be and was performed in a continuous movement without interference or interruption on the part of the industry.

The Commission has disagreed. Consequently, the issue presented to this Court is not the lawfulness of the principles, nor the application of those principles resulting in a prohibition of terminal switching to a state of facts which warrants such application. The issue before this Court is whether the precise factual situation in this case supports the Commission's conclusion that the switching service violates these principles and whether the Commission's conclusions are contrary to the uncontradicted evidence.

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[4] In the Motion to Affirm it is said that railroad and industry unjustifiably took it upon themselves to make this determination. This statement was made in the face of the often stated conclusion of the Commission confirmed by the courts that the principles are clear and understandable and completely susceptible of observance by ordinary laymen, certainly by experienced railroad personnel.

This Court is not asked to weigh the evidence and resolve questions of fact, nor is it asked to substitute its judgment for the Commission's in determining at what point the railroad's transportation duty at the line-haul rate begins and ends.

What the Court is asked to do in this appeal is to decide as a matter of law that there is no substantial evidence to support the Commission's findings and conclusions that the switching service is contrary to the established *Ex Parte 104* principles which have had the approval of this Court, and that the Commission's conclusions and findings to that effect are not adequate and are completely contrary to the evidence. The statutory court committed error in not so holding. The opinion of that court is limited to the general finding of law that the Commission's order is supported.

The discussion of the issues and of the evidence of record will disclose the substantiality of the questions presented which it is submitted clearly shows the justification and necessity for complete argument before the Court for disposition of the appeal. The Motion to Affirm should not be granted.

The traffic inbound and outbound at the industry's Warren, Ohio, plant may be divided into four groups for the purposes of the questions presented in this proceeding:

A. Inbound scrap which is check-weighed and the cars weighed light on the industry scale and which may be delivered to more than one location in the plant;

B. Outbound ingots and plant-produced scrap which is weighed initially on the plant scales;

C. Outbound ingots which are pulled from the loading location more than once a day;

D. All other inbound and outbound traffic.

All of these groups have different "switching facts" for purposes of this proceeding and, therefore, necessarily require separate findings to determine if the switching of each one of them does or does not conform to the dictates of the Commission in the *Ex Parte 104 cases.* This the Commission has failed to do in its final report in this proceeding, *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 283 I.C.C. 327 (1951). The decision of the three judge statutory court was equally lacking. Both relied on a recitation of some very general facts, many not directly bearing on the issue involved, and found the entire switching arrangement by the railroad unlawful. The Commission did criticize the inbound weighing of scrap and the multiple "drags" from the ingot loading track, but neither criticisms apply to the other two groups at all. There is not a single finding in the report, nor shred of evidence in the record, which could conceivably support the ultimate finding as to the latter two groups. In such circumstances this court very definitely has substantial matter before it in this appeal.

Nothing in the foregoing is intended to concede that switching at the industry's plant on any of the four groups is unlawful. The decisions of the Commission and of the three judge statutory court in all important respects are not supported by substantial evidence and represent a misapplication of the *Ex Parte 104* principles.

Both the industry and the railroad have said that they do not question the principles governing the propriety of railroad performance of industrial terminal switching services as laid down in the *Ex Parte 104 cases.* They stand by that position. The fact that this court has many times approved the application of these principles to specific fact situations not unlike those for which they were promulgated to control, and which resulted in forbidding the per-

formance of terminal switching service at the line-haul rate, does not in any way control or minimize the quality of "substantial" in the matter presented for review here. It is not the principles of which appellants complain but the matter of application. Application to a factual situation giving rise to conditions completely different than that for which they were promulgated to control is not proper exercise of the authority which this Court has stated was the function of the Commission. Such improper exercise of authority invalidates the order.

ARGUMENT

The Decisions of the Commission and of the District Court Are Not Supported by Substantial Evidence with Respect to the Switching of Inbound and Outbound Commodities.

The Ex Parte 104 *Propriety of Operating Practices — Terminal Services case, supra,* held that the basic determinative test of the extent of the carrier's terminal switching duty under its line-haul rates is whether a carrier can deliver and receive carload freight at the delivery and loading locations in a plant area in a continuous, uninterrupted movement at its operating convenience. A continuous movement has been defined as a movement between the carrier's tracks and the receiving and delivery points, in a plant, without any delay, or any suspension or break in time, or continuity of movement for which the industry is directly responsible, *American Chain & Cable Co., Inc., Terminal Allowance,* 277 I.C.C. 399 (1950).

In the first report in this proceeding, *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 269 I.C.C. 323 (1947), the Commission found at pages 341-342:

> "We find that it is the duty of respondent to deliver at the line-haul rates commodities contained in cars that are not weighed on the industry's scales, and cars

that are weighed on the industry's scales, provided they have not been previously weighed and are not moving under weight agreements with the consignors, from the east on tracks numbered 104, 315, 207, 208, 210, 212, 214, 217, 219, and 220 and from the west on tracks numbered 114, 115, 217, 220, and 225, all as described herein, and provided further, that respondent is permitted to perform these services without interruption or interference by the industry's engines.

"We further find that it is respondent's duty, at the line-haul rates, to receive cars loaded with bars and/or billets on track 101 and that part of track 200 west of the junction of tracks 101 and 200, all as described herein, provided the loaded cars are moved out of the plant in a continuous movement without any interruption caused by weighing them, except as hereinafter provided, or by circumstances or conditions for which the industry is directly responsible. The weighing on the industry's scales of out-bound loaded cars that do not pass any scale station enroute to destination and are not moving under weight agreements with the consignor shall not be considered an interruption or interference or a break in the continuity of the movement."

The record before the Commission at the time of this report contained clear and uncontradicted evidence that the switching could be and was accomplished in a continuous movement without interference from the industry, and the Commission recognized this in its decision except as to the question of weighing. Weighing will be taken up here separately in a later section.

A further hearing before the Commission was had on petition of the industry and the railroad to present additional evidence supporting elimination of the switching restriction on outbound shipments to bars and billets since the industry is equipped to manufacture a wide range of steel articles and its end products change with market

demands. Reconsideration of the question of weighing was also requested.

The evidence before the Commission at this hearing was also uncontradicted that the switching performed by the carrier was simple, efficient and continuous without interruption. The carrier submitted a very detailed resume of a typical day's switching operation (R. 698-722).[5] The only interruption noted was one lasting "not over a minute and a half". It is clear that such interruption cannot be characterized as repetitive or as inherent in the physical layout or operation of the industry.

Several representatives of the Interstate Commerce Commission also conducted a study of the switching service performed. This study was for a period of six days. The entire operation, both by the respondent in the placement and removal of cars to and from various places in the plant and the intra-plant operations of Copperweld by its own power and crews, was fully observed by the Commission representatives (R. 297-346, Ex. 30 to 33 inclusive). The reports of these inspectors corroborate the industry and railroad evidence that the switching by the railroad is performed at its own convenience, without interruption or interference by the plant operation, and is performed in a continuous movement. During the six-day period only four instances of any delay were reported. The total delay for all four instances amounted to only 27 minutes (Ex. 31). These instances do not furnish evidence that respondent can not switch the Copperweld plant without interruption. They are isolated instances which prove the rule. The fact that in an entire week of operation only these four slight delays were encountered is sufficient to prove that

[5] "R" references are to the record of testimony before the Commission at the April 19-21, 1950 hearing. Exhibits are cited "Ex" and were submitted into the record at the same hearing.

respondent's switching is uninterrupted by industry operation.

The Hearing Examiner in his proposed report, at sheets 7-8, recommended findings as follows:

> "The evidence clearly demonstrates that, except as to ingots loaded on track 315C, respondent is able to and does receive outbound loaded cars at the loading spots at its own operating convenience and without interference or interruption caused by the industry; that, except as to inbound carloads of scrap, respondent is able to and does deliver inbound loaded cars to the points of unloading at its own operating convenience and without interference or interruption due to the desires or disabilities of the industry; that there is no apparent necessity to coordinate respondent's switching with the operation of the plant except as noted above; and that the service performed by respondent in the receipt and delivery of carload freight, except on the traffic described, does not exceed the equivalent of team track or simple switch placement. While the switching performed on outbound ingots from track 315C is integrated with other switching in the vicinity of that track, it is apparent that the frequent and what may be termed special services in connection with the switching of ingots from track 315C are for the benefit of the industry and are in excess of the services respondent is obligated to perform at the line-haul rates. At no other point in the plant is more than one pull a day required of an outbound load from the loading spot."

Despite the clear and uncontradicted evidence of record, Division 3 of the Commission, in its final report, found all switching service beyond yard 100 outside of the railroad's obligation at the line-haul rate. *Terminal Allowance, Copperweld Steel Co., Warren, Ohio,* 283 I.C.C. 327 (1951).

The foregoing resume is given for the purpose of showing that there was considerable support within the Commission

and by the expert trial examiner for appellant's view of the evidence. Such situation, coupled with appellant's earnest contention that the record affirmatively and overwhelmingly shows the railroad's switching operation to be lawful, lends considerable force to the contention that substantial matter exists for review by this Court. Leaving the question of inbound scrap and outbound ingots aside for the moment, the Commission has not made adequate findings based on substantial evidence on the record considered as a whole to sustain their ultimate findings that the switching service performed by the railroad is unlawful. It could not do so, for the record does not contain any evidence to support such finding.

Certain unwarranted statements have been made in both the Commission's final report, supra, and in the three judge court decision obviously intended to be in the nature of primary findings in support of the ultimate findings, but which can not be given weight because of their nature.

At page 329, the Commission said:

> "* * * Practically all of the parts of the tracks used for loading and unloading traffic moving into and out of the plant are in front of, behind, or between parts of the same tracks used for loading and unloading intra-plant traffic."

Such statement, creating an inference of interference, gives no support whatever to the finding that the switching can not be performed to these locations in a continuous uninterrupted movement without interference, in the face of uncontradicted detailed evidence of such movement.

The only interference in the railroad's switching operations which the Commission was able to suggest was apparently what it considered potential interference. At page 332 it was said:

> "* * * Interference by industry power or equipment is inherent where, as here, switching is being performed concurrently by respondent and the industry."[6]

In addition to the record showing affirmatively that there is no actual interference by the industry with respondent's switching, such finding is unwarranted in that it is contrary to developments made in the terminal switching principles in the *Ex Parte 104 cases. Standard Oil Co. of Louisiana Terminal Allowance*, 266 I.C.C. 437, 447 (1946). In the *Standard Oil* case the Commission dismissed potential interference as a ground for denying the right to service at line-haul rates in the absence of a showing of actual interference.

In the decision of the statutory court, weight is seemingly placed upon the size of the industry yards and the time required of respondent to perform the switching. Such findings, without more, do not lend support to the Commissions's ultimate findings since they are contrary to the principles enunciated by the Commission itself in the first *Ex Parte 104 case, supra*, where it was said at page 43:

> "* * * Manifestly it is not the amount but the kind of service required which must be considered in de-

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[6] The Hearing Examiner made no such finding of fact. His findings completely negate even an inference of potential interference. At sheet seven of the Examiner's proposed report, it was said:

> "The evidence clearly demonstrates that, except as to ingots loaded on track 315C, respondent is able to and does receive outbound loaded cars at the loading spots at its own operating convenience and without interference or interruption caused by the industry; that, except as to inbound carloads of scrap, respondent is able to and does deliver inbound loaded cars to the points of unloading at its own operating convenience and without interference or interruption due to the desires or disabilities of the industry; that there is no apparent necessity to coordinate respondent's switching with the operation of the plant except as noted above; and that the service performed by respondent in the receipt and delivery of carload freight, except on the traffic described, does not exceed the equivalent of team track or simple switch placement."

termining whether the performance of such service is an obligation of the carrier under its line haul rates."

The industry yards were designed with the help of the railroad's engineers with the particular objective to make the switching operation simple and to eliminate any interference with a continuous switching movement. Switching the number of cars delivered and received daily from Copperweld to many smaller industries with simple siding arrangements would undoubtedly take more time and involve more train mileage than is necessary here.

Furthermore, the finding of the court that three crews were utilized by the railroad is related to another finding that an average of 50 cars daily were handled in the industry's plant. The record shows that only two crews were used to handle the average of 50 cars a day to which the court alluded. A pleading filed by appellant with the Commission, subsequent to the Commission's decision and order of September 28, 1951, seeking reconsideration because of changed conditions, asserted that a third crew had been added by the railroad. This was so because of an increase in the industry's business and in the number of cars handled inbound and outbound. In summary, two crews handled the average of 50 cars; three crews were put on to switch a larger number.

Aside from the statements mentioned and a very short and incomplete resume of the switching operation, the three judge court did not review in its decision, the "substantial evidence" which it considers supports the Commission's decision. It relies entirely on such general statements as:

> "* * * However, what is preserved in the record satisfactorily discloses that the Commission's substituted findings were compelling (ly) justified." (Page 3 of mimeographed decision).

"The Court could not overlook the glaring incongruity of plaintiff's position * * *" (Page 4 of mimeographed decision).

None of the facts mentioned in the court opinion go to support the essential issue in the proceeding as to whether the carriers switching operation is within the confines of the principles of the *Ex Parte 104 cases.* It is not what operations are performed that control, it is how these operations are performed. The District Court has failed entirely in supporting its ultimate conclusion that the Commission's decision is supported by substantial evidence.

The Use of the Industry Scale for Weighing Inbound Scrap and Certain Outbound Commodities Is for the Benefit of the Railroad.

The Commission's finding that weighing of inbound carloads of scrap constitutes interference and interruption ironically is contrary to the best interests of the railroad, which interests the *Ex Parte 104* principles were designed to protect. The record in this proceeding contains detailed and convincing evidence to the effect that the railroad of its own choosing uses the industry's scales because such use is quicker, more efficient and less expensive than use of railroad scales.

The industry has for some time been experiencing a great deal of difficulty with short weights in scrap shipments due principally to debris and foreign matter from other ladings found in the cars. Consequently, the industry under tariff provisions has instructed the railroads serving Warren to check-weigh inbound carloads of scrap to determine the accurate weight of the lading so that proper freight charges will be assessed. Necessarily the empty car must also be weighed. The industry uses the weight ascertained by the railroad for its own purposes also, which

it would do even if the weights were obtained on railroad scales. This is not a special service to the industry. It is a service which the railroad holds itself out to perform, upon request, by tariff provision duly filed with the Interstate and State regulatory commissions. A charge is made for each weighing if the net weight is within tariff tolerance. If it is not within tariff tolerance no charge is made for either weighing.

The request of the industry for reweighing is amply justified by its experience. The record contains detailed evidence of this experience both as to overcharges and undercharges on scrap and as to the amounts paid the railroad for weighing services (Ex. 41 and 42).

If the railroad were refused the use of the industry scale, it would be forced to use its own scales, none of which are near Warren. The use of any of these scales would entail extra expense, inconvenience and delay to the railroad. The record contains detailed evidence of the location of the railroad's scales and the disadvantages entailed in their use for weighing Copperweld traffic both inbound and outbound (R. 744-749).

Considering that the railroad is obligated to perform the weighing as part of its common carrier duty, it can not be said that the use of the industy scale is for the industry's benefit when the advantages to the railroad of such use are considered. It most decidedly is for the railroad's benefit and as such it can not be an interference or interruption in switching operation caused by the industry.[7] It is in-

[7] The Examiner did not find that weighing or reweighing of inbound scrap constituted interruption or interference. At sheet 6 of his proposed report, the Examiner described the weighing procedure and stated:

> "* * * The reweighing of cars of scrap is necessary because of varying amounts of debris and foreign matter remaining in the car from previous ladings having no relation to the scrap delivered to the industry."

dustry caused interruptions only not carrier caused interruptions, which are said to terminate the railroad's line-haul duty under the *Ex Parte 104* principles. The check-weighing involved here is not in violation of the *Ex Parte 104* principles.

If the railroad performed the weighing operation at its own scales, there could not be any question of interruption or interference. Under such circumstances the appellant railroad contends the Commission's finding with respect to weighing is unwarranted and is contrary to previous decisions of the Commission in situations exactly the same in the important respects: *Cancellation Terminal Charges at Decatur, Ill.*, 277 I.C.C. 57 (1950); *Wickwire Bros., Inc., Terminal Allowance*, 274 I. C. C. 307 (1949); and *Interlake Iron Corporation Terminal Allowance*, 245 I.C.C. 437 (1941).

What has been said regarding the check-weighing of scrap applies equally to those commodities which are weighed outbound by the railroad on the industry scales. The cars are tendered without weights. This is the initial weighing which is the carrier's obligation and duty to perform in order to compute freight charges. *In Re Weighing of Freight By Carrier*, 28 I.C.C. 7 (1913). The commodities in question are ingots and plant-produced scrap. The same disabilities to the use of the railroad scales when compared with the use of the industry scale exist here as they do with respect to inbound scrap. In addition, there is the possibility that dangerous overloads would be carried many miles before detection, endangering lives, equipment and roadbed.

The use of the industry scale is a simple and efficient, switching operation. The scale is located on the incoming track. The weighing is accomplished without any backward movement, or double movement, and requires 45 seconds to one minute per car (R. 427).

The weighing phase of the Commission's decision is certainly unwarranted in that it is directly opposed to other recent decisions, cited above, in the *Ex Parte 104* series. The finding that the weighing is for the benefit of the industry in the restricted sense that phrase is used in the *Ex Parte 104 cases* is entirely unsupported by the record. The weighing is a common-carrier service required of the railroads on demand. It could be performed at a railroad scale at much greater inconvenience and expense to the railroad without penalizing the industry of its rightful switching service. The weighing is for the benefit of the industry, only in the same sense that the line haul is for its benefit.

The Delivery of Scrap to More than One Location at the Industry's Plant Does Not Subject the Railroad Switching Operation to the Control of the Industry, nor Does it Inconvenience the Operating Efficiency of the Railroad.

The Commission in its final report, *supra*, at page 334 in discussing delivery of scrap said:

> "* * * Variable points for delivery would require direction and control by the industry without reference to carrier operating convenience and in many instances, additional movements in order to reach the point of placement."

This finding totally ignores the evidence of record. In all cases of plant switching the shipper has the right to, and must, tell the carrier where to place the car. This can not be said, and has never heretofore been held to constitute "direction and control by the industry". In this case the industry informs the railroad each day which yard or track on which it desires to take delivery of scrap, either yard 300 or track 500, and in rare instances track 110. The railroad switching crew is informed of the scrap delivery

location desired that day immediately upon entering the plant, before the day's switching operations are commenced. There is no possibility of extra movements by the railroad crew from one location to another because one location is full. The tracks are checked each day by the industry, before the incoming train arrives, to determine which location is available. Tracks 500 and 110 are intermediate to yard 300 and may be serviced by the railroad at all times in a continuous movement and without interference or interruption. Such facts were clearly shown by both the railroad's description of switching operations and by the Commission's inspectors' report. Clearly there is no evidence to support the Commission's finding that the railroad's operations in the delivery of scrap would be under the direction and control of the industry.

The Fact That Ingots Outbound Are Switched More Than One Time from the Loading Location Is Not Necessarily Contrary to Established Principles.

The Commission found that the switching of loads of ingots from the loading location more than once a day was a "special service" for the benefit of the industry and, therefore, not included in the line-haul rate. This finding as to "special service" is not supported by substantial evidence and is arbitrary in that it is not in conformance with the established principles promulgated by the Commission to govern performance by railroads of terminal switching services at line-haul rates.

The evidence is clear and uncontradicted that the switching of track 315C, where the ingots are loaded, is conformed with other switching operations in the same plant area and is performed at the convenience of the railroad. The Commission recognizes this for it finds switching on outbound

ingots from track 315C integrated with other switching in the vicinity of that track. Under such circumstances there is no basis for the Commission's finding that the service is "special service".

The Commission has never heretofore set a hard and fast rule forbidding a carrier to make more than one switch a day at the line-haul rates. To the contrary, in *Standard Oil Co. of Louisiana Terminal Allowance*, 266 I.C.C. 437, 458 (1946), the Commission said:

> "* * * It is not intended here to lay down any rule that not more than one switch a day may be made by a carrier at the line-haul rates. Whether a carrier is justified in doing so must be determined by the facts and circumstances attending and surrounding each particular plant or point in the plant. *Spencer Kellogg & Sons, Inc., Terminal Service*, 262 I.C.C. 205, *Archer-Daniels Midland Co., Terminal Service*, 259 I.C.C. 455 * * *."

In this same *Standard Oil Case* the Commission, in two instances, approved more than one switch a day to specific loading and/or unloading points. It was held that at the butadiene building more than one switch a day "would not be in violation of the act, provided that a full complement of four cars is handled in each previous switch made on the same day" (pp. 452-453). In this case the capacity of track 315C is two cars, and the "full complement", two cars, is pulled at each switch. Referring again to the *Standard Oil Case*, two or more switches were authorized for district 10 "when the volume of traffic warrants" (p. 444).

In any event the finding made as to ingots, even if it were sustainable, would not help to support the finding of unlawfulness as to any of the other switching operations either inbound or outbound, or to the switching of any

other product, or even to ingots switched from other locations where only one "pull" a day is necessary.

Moreover the industry has discontinued the production and shipment of ingots. The industry does not intend to re-engage in the shipment of ingots because of the addition of more finishing facilities.

It Is Well Settled That This Court Will Review Orders of the Interstate Commerce Commission, Allowing Full Argument, Under Circumstances Such as Are Present in This Case.

The Court in reading this brief in opposition to the Motion to Dismiss may note that very few decisions of this Court are discussed or cited in support of appellant's contentions and arguments, particularly since the Motion to Affirm lists a number of cases decided by this Court stated to be in support of either the Commission's or Statutory Court's decisions. This appellant has not felt it necessary to discuss those cases to show that they do not support the Commission's decision in this case, nor to differentiate the holdings in those cases from the decision we are asking of the Court here. That is so because what this Court in effect has held in those cases is that it is the function of the Commission to determine under the approved *Ex Parte 104* principles where line-haul transportation begins and ends. We do not quarrel with the Commission on that proposition. In the cases cited in the Motion to Affirm, this Court has held that such determination by the Commission must be supported by substantial evidence. We regard that proposition as well settled. As we stated at the outset, the substantial question presented here is whether the Commission's findings in this case are adequate and whether they are supported by substantial

evidence considering the record as a whole. *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474 (1951), *Florida v. United States*, 282 U.S. 194 (1931).

In this connection (the review of the Commission's order), it is deemed sufficient to call to the attention of the Court its decision in *Int. Com. Comm. v. Union Pacific R.R.*, 222 U.S. 541 (1912). It was therein stated at page 547:

> "* * * the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

And again at pages 547-548 the court said:

> "* * * 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I.C.C.*, 206 U.S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof — but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Appellant railroad is aware that this Court in *I.C.C. v. Mechling*, 330 U. S. 567 (1947) at 574 stated that:

> "Judicial review of the findings of fact and expert judgment of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited * * *."

However, within that limitation, the Court must set aside the Commission's order if it contravenes the rules laid down in the *Union Pacific* case. That is what this Court did in the *Mechling* case. Appellant railroad submits that the instant record likewise presents a situation where the Commission's order should be set aside because the order is not supported by adequate findings, is contrary to the evidence, is without evidence to support it, is arbitrary and for these reasons unlawful.

CONCLUSION

From the brief references to the evidence of record before the Commission and the statutory court in this case and from the discussion of the issues raised on appeal, the railroad believes it has been made apparent that the issues presented are substantial and should be reviewed by this court.

It has been demonstrated that the Commission's findings with respect to weighing, delivery of scrap and pick-up of outbound ingots are not supported by substantial evidence considering the record as a whole.

Further, it has been shown that even if the Commission's findings that weighing; delivery of scrap to more than one location; and more than one service per day to ingot-loading locations are considered sustainable as disabilities to a lawful switching operation, these findings are not sufficient to support the blanket prohibition of all terminal switching

at the line-haul rate. The industry receives inbound, and ships outbound, many other commodities which are not subjected to any of the conditions listed above. The record does not contain even a shadow of evidence that any disability pertains to their receipt or delivery. To the contrary the record affirmatively shows no disability to be present. Under such circumstances this court is presented with a fundamental question of the lawfulness of an administrative decision, which is based not on the evidence of record but on the undiscrimate application of general principles and therefore is not confined to this case alone, but is one of general importance and one to which this court has ever been sensitive to protect.

The Commission's decision in this case has the effect of artificially hampering the railroad's efforts to remain competitive with other forms of transportation. It has been forbidden by this decision to perform the complete, wholly lawful transportation service which it is eminently suited to perform. Railroads are best suited in many respects to serve a large part of the transportation needs of heavy industry, such as the Copperweld Company, if they are permitted to render a complete service including delivery to loading and unloading locations. However, if they are not permitted to do so, their natural advantages are largely nullified and other forms of transportation service become more attractive to the shippers. Such a result is a direct violation of the mandate of the National Transportation Policy which seeks to preserve in all forms of transportation the advantages inherent in each for the ultimate good of the national interest and the private interest of both the transportation agencies and the users of such agencies.

WHEREFORE, it is respectfully requested that the motion to affirm be overruled.

Respectfully submitted,

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Attorneys for
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FILED
NOV 25
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 358

COPPERWELD STEEL COMPANY, *Plaintiff-Appellant*,

and

THE BALTIMORE & OHIO RAILROAD COMPANY,
Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees*.

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL

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INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees.*

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL

Pursuant to Rule 33 of the Rules of this Court, Petitioners Copperweld Steel Company and The Baltimore & Ohio Railroad Company, for themselves and others similarly situated, pray that this Court grant rehearing of its decision filed October 10, 1952, granting the Motion to Dismiss

and dismissing the appeal in the above-entitled case, and that the Court decide that there is probable jurisdiction on appeal to review the final judgment of the United States District Court entered herein on June 24, 1952.

Appellant Copperweld Steel Company presents the following facts, circumstances, and reasons as the basis for its Petition:

1. In the railroad and industrial field the issues decided by the Interstate Commerce Commission in the instant case are of prime importance to most medium-size and large industry, and to many, if not most, of the nation's railroads.

2. The manner in which Division 3 of the Commission, consisting of Commissioners Patterson, Johnson, and Cross, failed to follow the facts as found by the Commission's Examiners, following lengthy hearings, should be of interest to this Court because of the importance of this case as a precedent and the nature of the record upon which the decision is necessarily based.

3. The importance of this decision by the Commission and its affirmance by the Court below is, we believe, that the Commission has gone further in the instant case than in any similar previous case involving the applicable principles heretofore applied by the Commission and in general affirmed by this Court. In so doing, we believe the Commission has gone beyond the limits of the previous decisions of this Court, certainly in the generality of the Commission's basic findings and conclusions and in the procedural methods by which such findings and conclusions were arrived at.

4. We believe that the applicable statutes and the decisions of this Court intend a set of rules under which industry and the railroads may understand and com-

prehend and between them provide workable methods of car delivery and pickup without depriving medium- and large-scale industry of some or all switching services included in the line-haul rate. The latter was done in the instant case. The force and effect of the instant decision is to permit the Commission arbitrarily, as here, to pick out certain industries and plants and say to them "You are not permitted to receive any switching services comparable to those received by the large majority of freight receivers and shippers in the nation." The discrimination in a situation like the instant one is real and the economic cost to this Company is burdensome. This is particularly true in situations, like the Steel Industry, where competition is keen and each penny and dollar of cost is reflected, either adversely or beneficially; and the differentiation of costs between plants and companies engaged in the same competitive field may become fatal.

The state of the law under the Interstate Commerce Commission's decision herein, plus the language of the opinion of the Court below, is one of confusion and utter uncertainty, and affects large numbers of industries and railroads throughout the nation.

The instant decision is the twenty-second decision in this Court on hearing or by consequent affirmance of a lower court's decision, starting with *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and involving principles and decisions of the Interstate Commerce Commission known as *Ex Parte 104*, 209 I.C.C. 11. We respectfully submit this Court should now clarify the law so that the Interstate Commerce Commission, as well as industry and the railroads, may have better guidance.

It is pointed out that the Briefs in this Court filed by Appellant Copperweld Steel Company and Appellant Baltimore & Ohio Railroad Company in support of jurisdiction

and in opposition to the Motion to Affirm recite specifically the many and detailed errors of the Commission's findings, as opposed to the findings and conclusions of its own examiners. The resulting arbitrary action of Commissioners Patterson, Johnson, and Cross ignores the actual facts and circumstances, to the grave economic detriment of Appellant Copperweld Steel Company.

As hereinafter outlined, important principles are involved which need clarification. If a rehearing is not granted and this decision is allowed to stand, it will become a dangerous precedent since notwithstanding the circumstance that a modern track layout has been conceived, engineered, constructed, and operated after consideration by and with the aid of railroad experts with a view of giving due regard to switching principles announced by the Interstate Commerce Commission, the Commission will henceforth be able to hold

(a) that the mere presence of industry power, notwithstanding absence of any actual interference with railroad power, is an absolute bar to terminal switching;

(b) that the mere fact of weighing on industry scale, notwithstanding the circumstance that such weighing takes place without interruption of movement, is less costly, less productive of delay, and more time saving to the Railroad than if done on the railroad's scale, is an absolute bar to terminal switching;

(c) that the mere circumstance that the same commodity is delivered to more than one location in the plant notwithstanding that such delivery is made in a continuous movement, is an absolute bar to terminal switching; and

(d) that possible delay in connection with the outbound switching *of one commodity*, which constitutes *an*

insignificant portion of the industry's operation, *taints the entire operation*, and bars any and all terminal switching within this plant by the Railroad under the line-haul rate.

It is submitted that this decision of the Commission and the Court below will constitute a dangerous precedent, and the consequences resulting therefrom, particularly on railroad transportation, will be far-reaching, disastrous, and contrary to the policy as envisaged by the National Transportation Act. Therefore, it is submitted that the public interest requires that this Court reconsider its action in granting the mation to affirm and review the Commission's order and the order of the Statutory Court, affirming the same.

Respectfully submitted,

ELLIOTT W. FINKEL
MAURICE J. MAHONEY
DAVID ROTH
Counsel for Appellants.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

.....
Attorney for Petitioner

No. 358. COPPERWELD STEEL CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Pennsylvania. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and the case set down for argument. *Elliott W. Finkel* and *Maurice J. Mahoney* for the Copperweld Steel Co.; and *Anthony P. Donadio* for the Baltimore & Ohio Railroad Co., appellants. *Acting Solicitor General Stern, Acting Assistant Attorney General Clapp* and *Ralph S. Spritzer* for the United States; and *Allen Crenshaw* for the Interstate Commerce Commission, appellees. Reported below: 106 F. Supp. 283.